

No. 21149 ✓

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

AMERICAN CEMENT CORPORATION,

Appellant,

vs.

HEALY TIBBITTS CONSTRUCTION COMPANY,

Appellee.

Upon Appeal from the United States District Court,
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF

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Jurisdiction

This action was instituted in admiralty in personam by appellant, American Cement Corporation, against Healy Tibbitts Construction Company, claiming for damage to its Barge No. 41 (\$13,457.80) and for wrongful withholding of money (\$9,426.39). The action arising out of a contract for chartering barges and a maritime accident on navigable waters came within the admiralty and maritime jurisdiction of the District Court of the United States.¹ The trial court found such jurisdiction to exist.²

¹ 28 U.S.C., Section 1333(1).

² Conclusion 1.

The case was tried before the Honorable Thurmond Clarke, United States District Judge, sitting in admiralty, commencing December 8, 1965. An opinion was filed by Judge Thurmond Clarke February 7, 1966.³ Appellant filed a motion to consider further and rule on an issue raised but omitted from the opinion.⁴ The motion was denied and counsel for third-party respondent Garvin Towboat and Barge Company was instructed to complete the findings of fact and conclusions of law consistent with the conclusions in the opinion.

Findings of Fact, Conclusions of Law and Final Decree were entered February 28, 1966.⁵ Within 90 days thereafter, on May 26, 1966, a Notice of Appeal was filed⁶ pursuant to the Order of Court Allowing Appeal dated May 26, 1966.⁷

Statement of the Case

Appellee Healy Tibbitts Construction Company (hereinafter referred to as "Healy Tibbitts") entered into a contract with the Department of Fish and Game of the State of California for construction of artificial fish reefs off Imperial Beach, California. In the fall of 1963, Richard H. Smith, Southern California Area Manager for Healy Tibbitts, and Charlton Dunn, Jr., General Man-

³ Clk.Tr. 19.

⁴ Clk.Tr. 26.

⁵ Clk.Tr. 32, 37.

⁶ Clk.Tr. 43.

⁷ Clk.Tr. 41; 28 U.S.C., Section 2107.

ager of the Catalina Rock Division of American Cement Corporation (hereinafter referred to as "American") discussed the possibility of American supplying the rock for the fish mound.⁸ The initial discussions contemplated American furnishing the rock at a fixed price per ton F.O.B. Healy Tibbitts' barges at the quarry on Catalina Island.⁹ Healy Tibbitts subsequently requested a price for rock delivered to the Imperial Beach job site on American's barges. Then Mr. Smith became concerned about possible demurrage costs so Mr. Smith and Mr. Dunn arrived at an arrangement under which American's barges were chartered to Healy Tibbitts for one trip to the job site at a fixed price regardless of the time involved.¹⁰ Healy Tibbitts hired Garvin Towboat and Barge Company (hereinafter referred to as "Garvin") to tow American's barges while under charter.¹¹

Healy Tibbitts issued a purchase order to Riverside Cement Company (American) dated January 6, 1964, confirming the rock price per ton F.O.B. barges Catalina and the charter hire rate for Barge No. 41 and Barge No. 42 and also the rate for furnishing an ESCO Orange Peel Bucket.¹² The charter of Barge No. 41 commenced at about 2:00 A.M. January 6, 1964, when the barge was taken in tow at Long Beach by a Garvin tug which then proceeded to American's quarry at Catalina. On

⁸ R.Tr. 18.

⁹ R.Tr. 18-19.

¹⁰ R.Tr. 19.

¹¹ R.Tr. 21-2, 66.

¹² R.Tr. 22; Exh. 2.

January 6, 1964, American loaded Barge No. 41 with 1966 tons of rock following which the Garvin tug took the barge in tow and proceeded on its voyage to Imperial Beach.¹³ En route to Imperial Beach on the morning of January 7, 1964, the barge took an unexpected and unexplained list to starboard, its cargo of rock shifted and slid into the sea, tearing away a portion of the barge's starboard bulwark.¹⁴ Barge No. 41 was towed back to Long Beach where Healy Tibbitts and its underwriters arranged for a survey¹⁵ and obtained bids to repair the barge.¹⁶ Healy Tibbitts refused to pay for the barge repairs so American paid the low bidder, Long Beach Marine Repair Company, \$8,404.00 for making the repairs.¹⁷ Also, Healy Tibbitts would not pay American's invoice for the rock furnished and claimed other damages resulting from the January 7, 1964 accident for which it backcharged or withheld \$9,426.39 from American.¹⁸

American filed a libel in admiralty against Healy Tibbitts to recover the \$8,404.00 repairs to Barge No. 41 (during the course of trial, American dropped its \$4,800.00 detention and \$253.80 surveyor fee claims) and the \$9,426.39 wrongfully withheld.¹⁹ American

¹³ Finding No. 8.

¹⁴ Finding No. 8.

¹⁵ R.Tr. 105-7; Exh. 10.

¹⁶ R.Tr. 118-9; Exh. 15.

¹⁷ R.Tr. 31; Exh. 5.

¹⁸ R.Tr. 32-3.

¹⁹ Clk.Tr. 2.

asserted that Healy Tibbitts had agreed to bareboat charter Barge No. 41 and further agreed to assume the responsibility or the risk of damage to the barge while Healy Tibbitts was using the barge. Healy Tibbitts answered generally denying American's allegations and filed a petition under Admiralty Rule 56 and a cross-libel against Garvin and American asserting that the barge listed, dumped the rock and was damaged because the barge was unseaworthy and/or improperly loaded by American and/or negligently towed by Garvin.²⁰ The assertions of Healy Tibbitts were denied by American and Garvin.

All issues were vigorously contested at trial and briefs submitted. Judge Thurmond Clarke filed a seven page opinion ruling that the barge casualty was an accident of the sea which occurred without fault on the part of anyone and characterized the charter as bareboat under which Healy Tibbitts became owner pro hac vice but that such a relationship did not impose responsibility on Healy Tibbitts for damage in the absence of negligence.²¹ Therefore, American recovered the \$9,426.39 withheld by Healy Tibbitts but not the \$8,404.00 it paid to have the barge repaired.²²

The opinion did not mention or rule on one of the issues presented, namely, whether as a matter of contractual agreement Healy Tibbitts assumed the responsibility or risk of accident or damage to Barge No. 41

²⁰ Clk.Tr. 10.

²¹ Clk.Tr. 19.

²² Clk.Tr. 37.

while under charter and, hence, was obligated to pay for the \$8,404.00 damage. Appellant filed a motion to consider further and rule on the aforesaid issue.²³ There was a short hearing at which the motion was denied from the bench and counsel for Garvin instructed to complete the findings of fact and conclusions of law so as to be consistent with the ultimate result in the opinion.

Findings of Fact, Conclusions of Law and Final Decree were entered February 28, 1966.²⁴ Appellant thereupon appealed in part from the decree in that the decree failed to order that American recover from Healy Tibbitts \$8,404.00 cost of repairing the barge.²⁵ The only question involved in this appeal is whether Mr. Smith, for Healy Tibbitts, and Mr. Dunn, for American, agreed that Healy Tibbitts would have the responsibility or risk of accident or damage to Barge No. 41 while it was under bareboat charter to Healy Tibbitts.

Specifications of Error

1. The District Court erred in finding:

“Under the terms of said agreement Healy Tibbitts did not undertake and was not obligated to return said barges in the same good order and condition as when received.” (Finding 6 in part.)

2. The District Court erred in failing to find that:

²³ Clk.Tr. 26.

²⁴ Clk.Tr. 32, 37.

²⁵ Clk.Tr. 41, 48.

(a) "Under the terms of the agreement between American and Healy Tibbitts, Healy Tibbitts agreed to assume the risk of damage to said barges or to return said barge in the same condition as when received, ordinary wear and tear excepted."

(b) "From January 31, 1964, there was and is now due and owing to American from Healy Tibbitts the sum of \$8,404.00 for the cost of repairing damage to Barge No. 41 suffered while said Barge was being operated by Healey Tibbitts as bareboat charterer."

3. The District Court erred in failing to make a conclusion of law that:

"American is entitled to recover the sum of \$8,404.00 from Healy Tibbitts together with the interest thereon at the rate of 6% per annum from and after January 31, 1964."

4. The District Court erred in failing to order, adjudge and decree that:

"American Cement Corporation have and recover from Healy Tibbitts Construction Company the sum of \$8,404.00 together with interest thereon at the rate of 6% per annum from January 31, 1964, to the date hereof in the sum of \$1,047.16."

Summary of Argument

Mr. Dunn of American testified clearly and consistently that Healy Tibbitts agreed to assume the responsibility or risk of damage to Barge No. 41 during the charter. Mr.

Smith of Healy Tibbitts attempted by vague generalities to deny that Healy Tibbitts had the responsibility but, on specifics, Mr. Smith's testimony is consistent with Healy Tibbitts having the risk and when Mr. Smith's testimony is combined with the Purchase Order of Healy Tibbitts signed by Mr. Smith, it is admitted by Mr. Smith that Healy Tibbitts had the risk of damage when the accident occurred. Undisputed facts and the actions of Healy Tibbitts are consistent only with Healy Tibbitts having all responsibility during the charter. Further, Healy Tibbitts' business records demonstrate that Healy Tibbitts had the risk at the time of the accident.

Argument

The only oral testimony on the issue of who had the risk of damage to Barge No. 41 during the charter to Healy Tibbitts was by Mr. Dunn of American and Mr. Smith of Healy Tibbitts. In fact, the negotiations and agreements were exclusively between those two. The documentary evidence pertinent to the issue was:

(1) Purchase Order dated January 6, 1964, prepared by Healy Tibbitts²⁶ ;

(2) Long Beach Marine Repair Company invoice of February 24, 1964, for \$8,404.00 barge repairs²⁷;

(3) United States Salvage Association report²⁸;

²⁶ Exh. 2.

²⁷ Exh. 5.

²⁸ Exh. 10.

(4) The January 6, 1964 Purchase Order as modified by Mr. Smith following the accident²⁹;

(5) Bids submitted for repairing the barge³⁰; and

(6) Healy Tibbitts' insurance broker's letter of April 1, 1964.³¹

Mr. Dunn testified specifically that Mr. Smith agreed that Healy Tibbitts would have the risk while the barge was under charter³². The general course of negotiations between Mr. Dunn and Mr. Smith³³ and the insurance arrangements are logical and consistent only with Healy Tibbitts having the risk during the charter. Mr. Dunn testified:

“Q Now, were there any discussions about insurance or coverage, did you discuss with Mr. Smith what insurance?

“A Yes.

“Q And what were those discussions?

“A I told Mr. Smith that our insurance upon the barges was \$25,000 deductible and we would be agreeable to naming him, or naming Healy Tibbitts Construction Company as co-insured on our policies, which would take care of the problem above

²⁹ Exh. 14.

³⁰ Exh. 15.

³¹ Exh. 16.

³² R.Tr. 20.

³³ R.Tr. 18-20.

\$25,000; that the risk under \$25,000 would be his problem to take care of; and Mr. Smith told me that he didn't think they wanted to carry that risk themselves; they would prefer to take out insurance to cover it.

And I told him that our insurance broker was Bayly, Martin & Fay, and specifically Mr. Webb Morrow.

He told me that his agent was, I believe he called him Bob Morrill, and gave me his telephone number. I gave that to Mr. Morrow, and Mr. Morrill and Mr. Morrow were to get together and work out the insurance and we were to be named co-insured under the policy that Healy Tibbitts took out; and we never did, so far as I know, receive evidence that we were named as co-insured, however, on their policies.

“Q Did you receive any report from American Cement Corporation's insurance broker, Mr. Webb Morrow as to what if anything had been done by Mr. Morrill with respect to coverage above \$25,000 which was American Cement Corporation's deductible, as I understand it?

“A Yes. He told me that he had arranged for Healy Tibbitts Construction Company to be named as co-insured on our coverage and that they had been named.

“Q And did you receive any report from Mr. Webb Morrow as to whether or not Healy Tibbitts'

broker had taken steps to cover the Barge 41 for the risk loss below \$25,000?

“A Mr. Morrow told me that Mr. Morrill told him that Healy Tibbitts had so covered that amount under the \$25,000 and he believed with a \$5,000 deductible.”³⁴

Mr. Smith on direct examination testified:

“Q Now, when you issued this purchase order and when you consummated your agreement with American, was it your intention to bareboat charter Barge 41?

“A No.

“Q And did you understand that you were bareboat chartering Barge 41?

“A No. It is not our custom to bareboat charter.”³⁵

On cross examination Mr. Smith testified:

“Q You, as I understand it, admit that Healy Tibbitts had care and custody and was responsible for the barge on the site?

“A Yes.

“Q Now, my question was, what was there about the transactions or the purchase order that changed the care and custody to Healy Tibbitts at the site?

³⁴ R.Tr. 20-1 and see Exh. 16.

³⁵ R.Tr. 65. The trial court found it was a bareboat charter (Finding 13).

“A Well, our tugboat — the small tugboat down there took it over and dispatched Garvin, yes.

“Q The change, the change in the tugboat at the site?

“A Well, the point is that I never saw this as anything but an F.O.B. proposition. So I assumed that we took responsibility upon delivery. Now, whether we paid 10 cents a ton or how we did it, it was still, in my thinking, an F.O.B. proposition.

“Q F.O.B. where?

“A Jobsite.

“Q Your understanding was that it was to be F.O.B. jobsite?

“A The mechanics of how they were paid didn't enter into it. In my thinking, this was an F.O.B. jobsite delivery, so we took custody upon delivery on the jobsite.

“Q And in your opinion, would Healy Tibbitts have the responsibility for the barge as soon as the F.O.B. transaction occurred?

“A Yes, yes.”³⁶

* * * *

“Q And that you, Healy Tibbitts was to accept, take the risk of any damage or loss to the barges while Healy Tibbitts had the use of the barges?

“A No. Mr. Dunn never mentioned any loss on the barges. I don't think it entered his mind.

³⁶ R.Tr. 87-8.

“Q Well, didn’t you discuss insurance?

“A Yes. I initiated the discussion of insurance, as I have said, because I wanted to know what would happen on the site, to be protected.

“Q But Healy Tibbitts has the use of those barges from the time that its tugboat, in this case GARVIN which it hired, picked up the barges until the tugboat returns the barges to American Cement, does it not?

“A Yes.

“Q And was not the insurance that was obtained covering the barges throughout that entire period, from the time that they were picked up by Garvin’s tugboat until they were taken over to Catalina and loaded, until it went down to Imperial Beach and until the barges returned to Long Beach and were redelivered to American Cement Company?

“A Yes. It was based upon one month’s coverage.

“Q And there was no restriction on the insurance coverage, that the insurance only attached while the barges were at the jobsite, was there?

“A It made no difference in the premium.

“Q Now, did you know whether or not you got insurance for a month or just for the trip?

“A It was my understanding it was one month.”³⁷

Patently, Mr. Smith's testimony is contradictory. The Healy Tibbitts' Purchase Order which Mr. Smith had prepared and signed specified F.O.B. delivery barges at Catalina,³⁸ Mr. Smith's own testimony confirms that Healy Tibbitts had responsibility for the barge as soon as the F.O.B. transaction occurred. The Purchase Order establishes an F.O.B. Catalina transaction. Therefore, by Mr. Smith's own admissions, Healy Tibbitts had the responsibility for the barge when the accident occurred.

If more need be said, the actions of Healy Tibbitts and its underwriters following the accident, as related by Mr. Smith, are consistent only with Healy Tibbitts having responsibility for the barge when the accident occurred. First Mr. Smith reported the accident to Healy Tibbitts' underwriters:

“Q Now, after the accident to Barge 41, did you make a report to your brokers or insurance company?

“A Yes. I wrote a letter to them.

“Q And when was that letter written?

³⁷ R.Tr. 92-3. Healy Tibbitts' insurance premium was a minimum \$100 per week or any part thereof (Exh. 16). American's insurance broker added Healy Tibbitts on Barges Nos. 41 and 42 coverage for “. . . a single trip from Long Beach to Catalina thence to Imperial Beach until their rock cargo is discharged, and thereafter until the barges are returned to Long Beach.” R.Tr. 96.

³⁸ Exh. 2.

“A I can’t be sure.

“Q Do you have it with you?

“A No. I do not.

“Q Well, approximately when was it written?

“A I should say a day or two after the accident.

“Q And what did you advise?

“A Oh, I just described the accident and I think that was all. I asked him what help or what we would do next for his help.

“Q And were you advised anything?

“A No. I don’t think so, at that time.

“Q Later, were you advised to do anything?

“A I believe that Mr. Morrill arranged counsel and I talked to an attorney.”³⁹

Then, Healy Tibbitts’ underwriters brought in a surveyor:

“Q Did you ever bring in a surveyor to inspect the damage to the barge?

“A I believe while the barge was tied up, it must have been a week later, while the shipyards were assessing or estimating the cost to repair it, a local surveyor did look at the barge.

“Q Do you know which surveyor?

“A I can’t recall his name. I think he is from Long Beach.

³⁹ R.Tr. 103-4.

“Q Did you ever see a survey report which set forth the damage to Barge 41 received from the accident down off of Imperial Beach and the recommended repairs?

“A I think I did, yes. I must have.

“Q Do you know if that survey report was prepared by someone representing Healy Tibbitts?

“A I can't recall ever hiring a surveyor to look at the barge. Now, that may have taken place or may have been caused by Mr. Morrill, but I can't recall it.

“Q Well, was it possible that you had talked with Mr. Morrill on the telephone before writing the letter to Mr. Morrill?

“A Yes, I think I told him the day of the accident, I think I called him and told him there had been an accident.

“Q And have you ever heard of the United States Salvage Association?

“A Yes.

“Q Do you remember whether or not United States Salvage Association acted on behalf of Healy Tibbitts' interests?

“A Well, U. S. Salvage was not the surveyor I had in mind, no. No, I don't recall U. S. Salvage being interested in this initially, or at any time for that matter.

“Q I would like to read you from Libelant’s Exhibit 10, which is on United States Salvage stationery. Are you familiar —

“A Yes.

“Q And it says, “BARGE ‘GRAHAM NO. 41’

“Report of survey made by the undersigned surveyor of the United States Salvage Association, Incorporated, on January 10, 1964 at the request of American National General Agencies Inc., Los Angeles on the barge ‘GRAHAM NO. 41’ 83 gross tons, 253532 official number, Healy-Tibbitts Construction Co. Owners and Operators, while lying afloat at Berth 58, Long Beach California.”

I will hand you this report and ask you if you have seen it before?

“A Well, since my name is on it, I must have been present when the survey was made. I don’t recall seeing the survey, reading the survey. I remember Mr. Kornegay presiding over the opening of the bids, but this was not done on the 10th, or maybe it was, but —

“Q And that would indicate that United States Salvage Association was acting in behalf of Healy Tibbitts, would it not?

“A Well, it indicates that American —

“Q Or its underwriters?

“A — National General Agencies hired them to make a survey.

“Q Those were your underwriters?

“A Yes.”⁴⁰

Next, bids to repair the barge were obtained by Healy Tibbitts and opened in Mr. Smith’s office:

“Q Mr. Smith, I hand you Libelant’s Exhibit 15 and ask you if you recognize those sheets?

“A Yes, these are quotations on the repairs to the barge.

“Q Are those the bids that were solicited for the repair of Barge 41 following the accident down off of Imperial Beach?

“A Yes, they were.

“Q And do those sheets refresh your recollection as to whom the bids were addressed?

“A Well, I can see they are addressed to Healy Tibbitts.”⁴¹

* * * *

“Q Mr. Smith, where were the bids opened?

“A In our office.

“Q And you were there, were you not?

“A Yes.”⁴²

Further, Healy Tibbitts’ own business records clearly and without exception demonstrate that Healy Tibbitts

⁴⁰ R.Tr. 104-7.

⁴¹ R.Tr. 108.

⁴² R.Tr. 119.

had the risk of loss or damage to Barge 41 throughout the term of the charter as set forth below:

(1) Exhibit 16—Marsh, McLennan-Cosgrove & Co.'s (insurance brokers for Healy Tibbitts) letter of April 1, 1964, to American National General Agencies, Inc. (Healy Tibbitts' underwriters) confirming that American National earned \$100 premium for Barge 41 being at the risk of Healy Tibbitts for the period January 6, 1964—0200 to January 8, 1964—0830 (the times Tug GARVIN picked up and returned the Barge to American's Seventh Street Terminal at Long Beach).

(2) Exhibit 14—Healy Tibbitts' purchase order dated January 6, 1964, as modified. After the accident, Mr. Smith changed the purchase order so that the rock would be furnished by American F.O.B. barges Imperial Beach rather than F.O.B. barges Catalina Island in order that Healy Tibbitts would not have the risk during the tow Catalina Island to Imperial Beach or back to Long Beach.

(3) Exhibit 10—United States Salvage Association survey report. Healy Tibbitts' underwriters called in United States Salvage to survey the damage to Barge 41. United States Salvage Association certainly must have been advised and understood that the damage to Barge 41 was Healy Tibbitts' responsibility because its report refers to Healy Tibbitts as the owner and operator.

(4) Exhibit 15—The bids submitted for repairing Barge 41 were addressed to Healy Tibbitts and opened in Mr. Smith's office with Mr. Smith in attendance.

The record in this case warrants under the clearly erroneous criterion, reversing that part of Finding 6 which ruled Healy Tibbitts “was not obligated to return the barges in the same good order and condition as when received.” However, in this case the criteria of judicial review in *Oliver J. Olson & Co. vs. Luckenbach Steamship Company* (9th Cir. 1960) 279 F.2d 662, 668, and *Arnolt Corp. vs. Stansen Corp.* (7th Cir. 1951) 189 F.2d 5, 10, would be more appropriate. Undisputed facts and the written record render such vague general denials of Healy Tibbitts’ responsibility, which Mr. Smith made at trial, extremely doubtful and of no probative value. Further, Mr. Smith’s oral testimony combined with Healy Tibbitts’ purchase order amount to an admission that Healy Tibbitts had the responsibility for the barge when the accident occurred. Can there be any doubt that the decree should be reversed in part to reflect that Healy Tibbitts was responsible for the barge damage as had been agreed?

Conclusion

As set forth in the specifications of error, the findings should be modified to provide that Healy Tibbitts did assume the risk of damage to the barge and to the findings, conclusions and decree there should be added provisions entitling American to recover from Healy Tibbitts \$8,404.00 with interest at the rate of 6% from and after January 31, 1964.

Respectfully submitted,

LILICK, GEARY, MCHOSE & ROETHKE
LAWRENCE D. BRADLEY, JR.

Attorneys for Appellant

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAWRENCE D. BRADLEY, JR.



APPENDIX A

Table of Exhibits

<u>Libelant's Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
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# 5 Repair Bill	Page 30	Page 30	Page 31
#10 United States Salvage Association Report	(Received in evidence during testimony not transcribed.)		
#14 Purchase Order Modified	Page 102	Page 102	Page 102
#15 Repair Bids	Page 107	Page 107	Page 107
#16 Insurance Broker's Letter	Page 109	Page 109	Page 109

